

Bingham McCutchen LLP  
WALTER M. STELLA (SBN 148215)  
walter.stella@bingham.com  
JACQUELINE S. BRONSON (SBN 222169)  
jacqueline.bronson@bingham.com  
Three Embarcadero Center  
San Francisco, CA 94111-4067  
Telephone: 415.393.2000  
Facsimile: 415.393.2286

Attorneys for Defendants  
UBS Financial Services Inc. (also sued as Paine  
Webber) and UBS PartnerPlus Plan (erroneously sued as  
UBS/Paine Webber Partner's Plus)

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION

Alva Gene Thaning,  
  
Plaintiff,  
  
v.  
  
UBS/Paine Webber, UBS/Paine Webber Partner's  
Plus, UBS Financial Services, Inc.,  
  
Defendant.

No. 07-5528 MJJ

**DEFENDANTS' REPLY IN  
SUPPORT OF MOTION TO  
COMPEL ARBITRATION AND  
STAY PROCEEDINGS**

Date: February 26, 2008  
Time: 9:30 a.m.  
Place: Courtroom 11, 19th Flr.  
Judge: Hon. Martin J. Jenkins

**I. INTRODUCTION**

Plaintiff violated this Court's Standing Order by not filing his Opposition on time. He did not ask for an extension and has presented no circumstances justifying excusable neglect. For this reason alone, Plaintiff's Opposition should be stricken by the Court, and Defendants' Motion granted.

Even if the Court considers the Opposition, the result does not change. Plaintiff concedes he signed the Form U-4 and that it remained in effect until his termination. Plaintiff's challenge to the Form U-4 rests upon the mistaken proposition that Item 10 is missing from the

A/72421303.4/0377878-0000329911

Case No.: 07-5528 MJJ

Form and therefore the agreement is silent on what rules would apply to the arbitration. In fact, however, Item 10 is not missing - - it's on the first page and was completed by Plaintiff.

Moreover, Plaintiff's argument that the Form U-4 was superseded by the UBS PartnerPlus Plan (the "Plan") and that Defendants UBS Financial Services Inc. (also sued as UBS/Paine Webber) and UBS PartnerPlus Plan (erroneously sued as UBS/Paine Webber Partner's Plus) (collectively, "UBS") somehow waived their right to compel arbitration lacks merit. Rather than serve as a basis for avoiding arbitration in this case, Plaintiff's argument goes to the merits of a potential exhaustion of remedies defense by UBS. Any waiver by UBS of Plaintiff's obligation to exhaust the claims procedure under the Plan simply eliminates a potential affirmative defense to Plaintiff's three causes of action under ERISA. A waiver of the Plan claims procedure does not change the analysis of whether arbitration is the appropriate forum for this case pursuant to the Form U-4. Once the appropriate forum is determined, the court or arbitrator can address the merits of any affirmative defenses, including whether Plaintiff's obligation to exhaust administrative remedies has been waived by UBS.

## II. LEGAL ARGUMENT

### A. Plaintiff's Opposition Should Not Be Considered By The Court

The Local Rules for the Northern District are clear. Rule 7-3 provides "Any opposition to a motion must be served and filed not less than 21 days before the hearing date." (Emphasis added.) The hearing in this case is set for February 26. Under the Local Rules, Plaintiff's Opposition was due on Tuesday, February 5, 2008. Plaintiff did not file any Opposition on that date. (Declaration of Jacqueline S. Bronson ¶ 2.) He did not ask for an extension. (*Id.*) He made no showing to the Court justifying the late filing, let alone any showing of excusable neglect. Rather, Plaintiff blatantly ignored the Local Rules and this Court's clear Standing Order and did not provide UBS with his Opposition until Friday, February 8 - - 3 days late.<sup>1</sup> (*Id.* at ¶ 3.)

---

<sup>1</sup> This case is subject to electronic case filing. Rule 5-5(b) provides: "In cases subject to the Local Rules or General Orders of this Court regarding Electronic Case Filing, all pleadings and

UBS requests that the Court not consider the Opposition and hereby requests the Court to strike it. *See Kona Enterprises, Inc. v. Estate of Bishop ex rel. Peters*, 243 Fed.Appx. 274, 277 (9th Cir. 2007) (not selected for publication in federal reporter, citable under Ninth Circuit Court of Appeals Rule 36-3 and Fed. Rule of Appellate Procedure 32.1) (“The district court did not abuse its discretion to striking certain exhibits that were filed four days after the deadline for filing an opposition”); *Kyle v. Campbell Soup Co.*, 28 F.3d 928, 931 (9th Cir. 1994) (no excusable neglect for attorney filing motion two days late; district court abused its discretion in accepting late papers); *Wood v. Santa Barbara Chamber of Commerce, Inc.*, 705 F.2d 1515, 1519 (9th Cir. 1983) (“given the tardiness with which each of these documents was submitted, the district court acted within its discretion in rejecting both”).

**B. Plaintiff’s Opposition Does Not Contest The Merits Of Defendant’s Arguments**

As set forth more fully in UBS’s moving papers, disputes between a member of one of the national stock exchanges and its employees are governed by the Federal Arbitration Act (“FAA”) where there is a binding arbitration agreement. (Moving Memorandum, Page 6.) The FAA declares that agreements to arbitrate “shall be valid, irrevocable, and enforceable.” 9 U.S.C. § 2. The Supreme Court has unanimously held that “the Act leaves no place for exercise of discretion by a district court, but instead mandates that district courts *shall* direct the parties to arbitration on issues as to which an arbitration agreement has been signed.” *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 218 (1985) (emphasis in original). Courts have long found that execution of a Form U-4 constitutes a valid and enforceable arbitration agreement under the FAA. (Moving Memorandum, Page 6.) Plaintiff disputes none of this.

Moreover, Plaintiff does not dispute that he executed the Form U-4 or that it remained in effect through his termination. Nor does he contest that each of the causes of action

---

(Footnote Continued from Previous Page.)

papers must be electronically served in accordance with those Rules or General Orders.” (Emphasis added.) In his declaration, Plaintiff’s counsel claims that he was not served with the moving papers. (Declaration of James C. Bridgman, ¶ 14.) On the contrary, Plaintiff’s counsel was properly served pursuant to Local Rule 5-5(b). (Bronson Decl. at ¶ 4.)

1 alleged by him in this suit are properly subject to the arbitration provision of the Form U-4.  
 2 (Moving Memorandum, Pages 6-7.) Thus, if this Court rejects Plaintiff's arguments, arbitration  
 3 of each of Plaintiff's claims is required under the Form U-4 agreement.

4 **C. Plaintiff's Only Challenge To The Form U-4 Is Based On A Mistaken**  
 5 **Reading Of The Agreement**

6 Page 4, Paragraph 5, of Plaintiff's Form U-4 explicitly provides:

7 I agree to arbitrate any dispute, claim or controversy that may arise  
 8 between me and my firm, or a customer, or any other person, that  
 9 is required to be arbitrated under the rules, constitutions, or by-  
 laws of the organizations with which I register, as indicated in item  
10 as may be amended from time to time. (Emphasis added.)

10 Plaintiff argues that the Form U-4 should not lead to arbitration in this case  
 11 because "item 10" is missing and "[t]here is no mention of FINRA, nor NASAD in this Form U-  
 12 4 form." (Opposition, Page 7.) This statement is simply incorrect. Item 10 is on page 1 of the  
 13 Form U-4. In fact, Item 10 was completed by Plaintiff wherein he identifies the entities with  
 14 which he is registered: the NASD, NYSE and the State of California. FINRA, created in July  
 15 2007, is the successor entity of the consolidation of two self-regulatory organizations – the  
 16 NASD and the enforcement unit of the New York Stock Exchange. (Moving Memorandum,  
 17 Page 2, fn. 1.) Thus, Plaintiff's argument that there is no mention of NASD or Item 10 is  
 18 supported by nothing more than a failure to correctly read the Form.

19 Plaintiff further argues that UBS's Exhibits B and C do not mention arbitration.  
 20 Again, he is - - at best - - mistaken. Exhibits B and C to UBS's moving papers evidence that on  
 21 at least two occasions Plaintiff was required to confirm in writing his obligations under the Form  
 22 U-4, including his obligation to arbitrate claims with UBS. Page 2, Paragraph 1 of the Exhibits  
 23 both provide that: "[y]ou are agreeing to arbitrate any dispute, claim or controversy that may  
 24 arise between you and your firm..."

25 **D. Plaintiff's Waiver Argument Is Unavailing**

26 **1. The Form U-4 Was Never Superseded By Another Agreement**

27 Plaintiff argues that the Form U-4 was superseded by the requirement in the Plan  
 28 that Plaintiff exhaust the Plan's claims procedure before filing suit. Plaintiff's argument is not

1 supported by law.

2 “When a party seeking to avoid arbitration contends that the clause providing for  
3 arbitration has been superseded by some other agreement, ‘the presumptions favoring  
4 arbitrability must be negated expressly or by clear implication.’” *See e.g., First Liberty Inv.*  
5 *Group v. Nicholsberg*, 145 F.3d 647, 650 (9th Cir. 1998) (rejecting that later signed agreement  
6 superseded Form U-4). Indeed, courts have held that even later signed employer/employee  
7 agreements specifically superseding all prior agreements do not abrogate an employee’s  
8 obligation to arbitrate disputes required by the Form U-4. *See e.g., In re Prudential Ins. Co. of*  
9 *Am. Sales Practices Litigation*, 924 F.Supp. 627, 635 (D.N.J.1996)(superseding employment  
10 contract after promotion did not affect Form U-4 arbitration agreement) *rev'd on other grounds*,  
11 133 F.3d 225 (3d Cir.1998). “The Form U-4 is a separate contract, and as long as this contract is  
12 effective, the terms of the agreement must be followed, regardless of the fate of a separate,  
13 though related, agreement.” *O'Donnell v. First Investors Corp*, 872 F.Supp. 1274, 1277  
14 (S.D.N.Y. 1995). Here, Plaintiff can point to no clear and unambiguous agreement between him  
15 and UBS superseding his obligation to arbitrate under the Form U-4.

## 16 2. Plaintiff's Obligation To Exhaust The Plan's Claims Procedure 17 Before Filing Suit Does Not Waive Arbitration

18 Plaintiff argues without support and contrary to applicable case law that the Plan's  
19 claims procedure vitiates his Form U-4 obligation to arbitrate his claims. To support his  
20 argument, Plaintiff relies on paragraph 11.5 of the 1998 Plan, which states:

21 **Exhaustion of Remedy.** No claimant may institute any action or  
22 proceeding in any state or federal court of law or equity, or before  
23 any administrative tribunal or arbitrator, with respect to benefits  
24 under the Plan, until he/she has first exhausted the procedures set  
25 forth in this Article XI.

26 The 2004 Plan contains a similar provision in paragraph 11.1:

27 **General.** All claims for benefits under this Plan must be filed in  
28 writing with the Committee in accordance with such procedures as  
the Committee reasonably establishes. If any claim is wholly or  
partially denied, any challenge of such denial must be pursued in  
accordance with the arbitration provisions of Section 11.2.

(Ex. D to UBS's moving Papers, at p.18, ¶ 11.2).<sup>2</sup>

Neither Plan version extinguishes Plaintiff's obligations to arbitrate this case.

Instead, both Plan versions impose a duty upon Plaintiff to exhaust administrative remedies. If Plaintiff failed to do so, UBS could raise an affirmative defense in court or arbitration that Plaintiff's ERISA claims are barred for failing to exhaust administrative remedies. *See, eg., Gatti v. Reliance Standard Life Ins. Co.*, 415 F.3d 978, 983 (9th Cir. 2005) ("...a claimant must exhaust her plan's administrative review procedures before she may bring suit in federal court..."); *Horan v. Kaiser Steel Retirement Plan*, 947 F.2d 1412, 1416 (9th Cir. 1991) ("A beneficiary seeking a determination of rights or benefits under a plan must first exhaust the administrative remedies provided by the plan"). Likewise, if UBS is found to have waived or failed to follow the Plan procedures, Plaintiff may be allowed to proceed to litigate the merits of his ERISA claims without being required to exhaust his administrative remedies first. *See e.g., Shepherd v. Worldcom, Inc.*, 2005 WL 3844069, 8 (S.D.Tex.,2005) (decided under ERISA) (discussing how failure to exhaust administrative plan remedies is an affirmative defense that can be waived if the company fails to follow exhaustion process but finding no estoppel based on the facts of the case); *Bourgeois v. Pension Plan for Employees of Santa Fe Intern. Corporations*, 215 F.3d 475, 482 (5th Cir. 2000)(same legal proposition).

In short, waiver or failure to follow the Plan claims procedure does not mean waiver of the mandatory arbitration requirements under the Form U-4 as Plaintiff argues. At most, even if successful, Plaintiff's waiver argument does little more than estop UBS from arguing that Plaintiff failed to exhaust administrative remedies. It has no impact on his obligations to arbitrate the claims in this case pursuant to the Form U-4.

### **3. The Plan's Claim Procedures And Form U-4 Both Require Binding Arbitration Under The FINRA Rules**

Contrary to what Plaintiff argues in his Opposition, invoking the Plan's claims

---

<sup>2</sup> For purposes of this Motion, it does not matter which Plan applies. The mere existence of a claims procedure in any version of the Plan does not supersede the Form U-4 Agreement's obligation to arbitrate.

procedures under any version of the Plan leads to the same outcome - - both the 1998 and 2004 versions of the Plan require binding arbitration under FINRA's arbitration rules. Section 11.4 of the 1998 Plan attached as Exhibit B to Plaintiff's Complaint provides in paragraph 11.4:

**Arbitration.** Subject to exhaustion of the procedures specified in Sections 11.1 through 11.3 hereof, in the event of any dispute, claim, or controversy involving a Participant or any other claimant and the Plan, or PaineWebber or any Sponsor, arising out of the Plan, any such controversy should be resolved before an NASD arbitration panel in accordance with the arbitration rules of the NASD. (Emphasis added.) (Complaint, Exh. B.)

Likewise, the Plan in effect at the time of Thaning's termination also requires that he submit his claims to binding arbitration. Specifically, Page 18, Paragraph 11.2 states:

**Arbitration.** Subject to exhaustion of the procedures set forth in Section 11.1, in the event of any dispute, claim or controversy involving a Participant or any other claimant and the Plan, or UBS Financial Services or any Sponsor, arising out of the Plan, any such controversy shall be resolved before an NASD arbitration panel in accordance with the arbitration rules of the NASD. (Emphasis added.)

(O'Connell Dec., ¶ 5, Ex. D.) The applicable FINRA arbitration rules mandate binding and final arbitration. *See* NASD Code of Arbitration Procedure for Industry Disputes Rule 13904(b) ("Unless the applicable law directs otherwise, all awards rendered under the Code are final and are not subject to review or appeal"). Plaintiff's contention that the Plan's complaint procedures provide for non-binding arbitration is simply wrong.

### III. CONCLUSION

Plaintiff's late Opposition should not be considered and should be stricken. Even if the Court considers his Opposition, the result does not change. Plaintiff undeniably executed a Form U-4 which requires arbitration of the claims raised in this suit, and he reaffirmed this obligation on at least two occasions. Plaintiff's mistaken assertion that the Form U-4 is missing Item 10 or that UBS waived its ability to compel Plaintiff's obligations to exhaust the claims procedure under the Plan, does not change this fact.

//



1 Accordingly, the Court should compel arbitration and stay this entire action  
2 pending binding arbitration.

3 DATED: February 12, 2008  
4

5 Bingham McCutchen LLP  
6

7  
8 By: /s/ Walter M. Stella  
9 Walter M. Stella  
10 Attorneys for Defendants  
11 UBS Financial Services Inc. (also sued as Paine  
12 Webber) and UBS PartnerPlus Plan  
13 (erroneously sued as UBS/Paine Webber  
14 Partner's Plus)  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28